VOLUNTARY LABOR ARBITRATION

In The Matter of the Grievance

-Between-

PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS, AFL-CIO
and

U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION

Grievance No. (AF)WP-01-029- SRN-5
Re: Discharge of John A. Doe

ARBITRATOR'S OPINION AND AWARD

REPRESENTING THE PARTIES:

For the Union:	Michael D. Derby, Esq. General Counsel Professional Airways Systems Specialists 1150 17th Street N.W., Suite 702 Washington, D.C. 20036
For the Employer:	Richard N. Fossier Labor Relations Specialist Federal Aviation Administration, AWP-16-A P.O. Box 92007 Los Angeles, California 90009
ARBITRATOR:	Jill Klein Attorney at Law 2470 Lambert Drive Pasadena, California 91107-2507

INTRODUCTION

The above matter was heard on June 19 and 20, 2002 at the Prescott Automated Flight Service Station at Prescott, Arizona, and on July 10, 2002, via telephone conference call. All parties to the dispute were present and were given the opportunity to present testimonial and documentary evidence, to call witnesses to be examined and cross-examined under oath, and to advance arguments regarding their respective positions. The parties stipulated that the matter properly was before the Arbitrator for resolution. A record of the proceedings was made by Superior Reporting Services of Petaluma, California.

The parties elected to submit closing briefs. The brief of the Agency was received on August 28, 2002. The brief of the Union was received on September 3, 2002, at which time the record of these proceedings closed. The parties agreed that the decision of the Arbitrator would be due within thirty days of the close of the record.

ISSUE S

The parties stipulated that the issues to be decided by the Arbitrator are as follows:

Was the removal of Airway Transportation Systems Specialist John Doe for just cause and to promote the efficiency of the service; if not, what is the appropriate remedy?

DECISION

I find that the removal of the Grievant was not for just cause and did not promote the efficiency of the service.

APPLICABLE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 5

Grievance Procedure

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Section 10. The arbitrator's fees and expenses of arbitration incurred under this Article

shall be borne equally by the Parties. If a verbatim transcript of the hearing is made and either Party desires a copy of the transcript, that Party will bear the expense of the copy or copies they obtain. The Parties will share equally the cost of the transcript, if any, supplied the arbitrator.

Section 11. The arbitrator shall confine himself/herself to the precise issue submitted for arbitration and shall have no authority to determine any other issued not so submitted to him/her. In disciplinary cases, the arbitrator may vary the penalty to conform to his/her decision provided it is consistent with law and the FAA PMS. In accordance with 5 U.S.C. Section 7122(b), the Parties acknowledge that the Arbitrator has the authority to render a remedy in accordance with all of the provisions of 5 U.S.C. 5596.

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ARTICLE 6

Disciplinary Actions

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Section 3. Disciplinary actions shall be taken only for just cause and will be fair and equitable as governed by the FAA PMS, applicable FAA directives, and this Agreement. Actions may be taken only for such cause as will promote the efficiency of the Federal service and warranted by just and substantial cause. Actions based on conduct must be supported by a preponderance of evidence. Actions based on performance must be supported by substantial evidence.

Section 4. Supervisors are responsible for determining if corrective disciplinary action is warranted. Whether the action decided upon is formal or informal, the principles set out in this Section should be observed in determining the severity of the discipline. Not all factors apply in every case. Some of the factors may weigh in the employee's favor, while other may not or may even constitute aggravating circumstances. All factors must be considered and a responsible balance reached. These factors do not apply to actions based on performance or non-disciplinary removals.

a. the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or inadvertent, and whether it was frequently repeated;

b. the employee's job level, including any supervisory or fiduciary role, contacts with the public, and prominence of the position;

c. the employee's past disciplinary record;

d. the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

e. the effect of the offense on the ability of the employee to perform at a satisfactory level, and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;

f. the consistency of the penalty with those imposed upon other employees for the same or similar offenses;

g. the consistency of the penalty with any applicable agency table of penalties;

h. the notoriety and/or egregiousness of the offense, or its impact upon the reputation of the agency;

i. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

j. the potential for the employee's rehabilitation;

k. the mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter; and

l. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

DISCUSSION

The underlying facts giving rise to this grievance are not in dispute. At all

times pertinent hereto, Grievant John A. Doe was employed by the Respondent Federal Aviation Administration (hereinafter referred to as the Agency) as an Airway Transportation Systems Specialist at the Prescott Systems Service Center in Prescott, Arizona. The Prescott Systems Service Center is part of the Sierra Nevada Systems Management Office, which is located in the Agency's Western-Pacific Region.

The Grievant began working for the Agency in 1990. He was assigned to the Environmental Office, where he installed, maintained, and modified lighting, electrical, engine, and air conditioning systems. He has worked at the Prescott Systems Service Center since October of 1998, when he obtained a hardship transfer to said location in order to be closer to his ailing father. The Grievant has no record of prior discipline, and has received eight commendations (Joint Exhibit 20) during his tenure with the Agency.

Prior to beginning his employment with the Agency, the Appellant had a substance abuse problem, which he characterized as being extensive. The Appellant testified that he took his last drink on May 12, 1984, and has been clean and sober ever since. He stated that he has been diagnosed with degenerative disk disease, and has lost two of the disks in his upper back; as a result, he is in constant pain, for which he takes prescription medication. He also has sought the services of a chiropractor, gotten massages, and taken biofeedback classes, in an effort to deal with the pain.

I take administrative notice that Executive Order 12564, Drug-Free Federal Workplace, in pertinent part, requires Executive agencies of the federal government to test employees in "safety-sensitive" positions for the use of illegal drugs. The Omnibus Transportation Employee Testing Act of 1991, in pertinent part, requires the Secretary of Transportation to establish a program to test for the use of alcohol and controlled substances by employees of the Federal Aviation Administration whose duties include responsibility for safety-sensitive functions. Department of Transportation Order 3910.1C (Joint Exhibit 3) sets forth the policies and procedures for implementing said Executive Order and Act.

Pursuant to Order 3910.1C, employees in specified job classifications are deemed to occupy safety-sensitive "testing designated positions." They thus are required to submit to drug tests prior to employment; following accidents; when there is reasonable suspicion of drug use; and on a random basis. The parties stipulated that as an Air Transportation Systems Specialist, the Grievant occupied a "testing designated position." Throughout his career with the Agency prior to December of 2000, the Grievant was given random tests for the presence of drugs, including alcohol, in his system, and consistently tested negative. On December 20, 2000, he was given a random drug test, and tested positive for the presence of morphine. *See,* Joint Exhibit 4, Attachment A-I. The Appellant stated that he was out of town, visiting a friend, when he ran out of his prescription medicine and took some medicine that had been prescribed for his friend. He stated that it was said medicine that resulted in the positive

drug test. The Union does not contest the fact that taking medication prescribed for someone else is a dischargeable offense.

By letter dated January 22, 2001 (Joint Exhibit 4, Attachment C-I), the Grievant was informed that Sierra Nevada Systems Management Office Manager John R. Carlson proposed to remove him from his position for off-duty use of a controlled substance. The letter also stated that,

> Full consideration will be given to your willingness to participate in and successfully complete an FAA-sponsored Substance Abuse Rehabilitation/Treatment Program, and your agreement to abide by conditions of that program and any other conditions of rehabilitation that I may subsequently submit to you.

By letter dated February 2, 2001 (Joint Exhibit 4, Attachment D-I), the Grievant admitted that he had exercised poor judgment and would have to pay a price for his actions. He also stated that he wanted to keep his job, and that he was willing to do whatever it took to accomplish that goal. In said regard, he already had made inquiries about going into a drug rehabilitation program.

On February 8, 2001, the Grievant was evaluated by the Central Mountain Counseling Center for the benefit of the Agency's Employee Assistance Program. The assessor recommended to the Agency that the Grievant attend Alcoholics Anonymous/Narcotics Anonymous meetings and receive outpatient counseling on an individual basis, "at the most 1 day per week...possible interchange & alternate weeks." *See*, Joint Exhibit 4, Attachment M-I). The assessment was reviewed by F.A.A. Senior National Case Manager Gary M. Pippenger of Magellan Behavioral Health of Maryland Heights, Missouri, which contracts with the Agency to administer its drug rehabilitation program. In report dated February 16, 2001 (Joint Exhibit 4, Attachment N-I), Mr. Pippenger concurred with Central Mountain Counseling Center, recommending that the Grievant complete an intensive outpatient program and attend twelve-step meetings.

Rehabilitation/Treatment Plan dated March 1, 2001 (Joint Exhibit 4, Attachment O-I), subsequently was prepared by the Agency. The plan contained more components than those that had been recommended by the outside contractors. In brief, said plan was to last one year and required the Grievant to (1) enroll in a thirty-day residential treatment program; (2) spend a minimum of two weeks in a day-treatment program lasting between six and eight hours per day; (3) participate for a minimum of four weeks in intensive outpatient treatment sessions lasting between three and four hours per day; (4) attend aftercare sessions at least once a week for the duration of treatment; and (5) attend daily Alcoholics Anonymous/Narcotics Anonymous meetings for ninety days, followed by three meetings per week. The plan also states,

> Failure to comply with the requirements of this Rehabilitation/Treatment Plan will result in further action by the Agency to remove you from Federal service.
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> ....
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> You must agree to any additional treatment or counseling as recommended by your treatment provider, [primary treatment counselor] Ms. Shannon, [Agency Employee Assistance Program Manager] Ms. Lopez-Hickson, [Deputy Flight Surgeon] Dr. Griswold, or Mr. Pippenger. You acknowledge that this plan can be modified at a later date as necessary to provide the best opportunity for rehabilitation success.
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> ....
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> **If you are unable to attend any scheduled treatment activity for <u>any</u> reason, you must contact Ms. Lopez-Hickson 24 hours in advance at (310) 725-7829. She will make the final determination for an excused absence.** <u>Missed appointments or missed meetings must be made up during the same week.</u> This requirement includes individual appointments, group sessions, and AA/NA meetings.

(emphasis original). The Grievant signed the plan on March 7, 2001, thereby signifying that, "I have read, understand and agree to abide by the conditions outlined in this Substance Abuse Rehabilitation/Treatment Plan." By letter from Mr. Carlson dated July 26, 2001 (Joint Exhibit 4, Attachment D-II), the Grievant was informed that his removal would be held in abeyance pending his successful completion of rehabilitation and fulfillment of other conditions outlined in the plan.

The Grievant undertook his rehabilitation program at the Hillside Center of West Yavapai Guidance Clinic of Prescott, which had never before worked with the Agency. On March 22, 2001, the Grievant signed Conditions of Admission and Consent for Treatment (Joint Exhibit 4, Attachment Q-I) in which he acknowledged, in pertinent part, "I agree to abide by the program rules established by West Yavapai Guidance Clinic as these are explained to me during the orientation procedure."

The thirty-day residential treatment portion of the rehabilitation plan took place between April 27, 2001, and May 24, 2001. Robert Steele, primary therapist for the residential chemical dependency unit at the clinic, testified that: The Grievant was an excellent client whom he was pleased to have in the unit. The Grievant was very

cooperative, helpful, and willing to share his experience and knowledge with others who were new to recovery. While the Grievant was undergoing residential treatment, Mr. Steele spoke to Employee Assistance Program Manager Cindy Lopez-Hickson and at least one other person at the Agency regarding the Grievant's progress and course of treatment. Although the rehabilitation plan of the Agency called for the Appellant to undergo residential treatment for twenty-eight days, Mr. Steele recommended that the Appellant be permitted to move on to the next phase of treatment during the third week, based upon the relatively minor nature of his relapse and the fact that the Appellant had had extensive experience in recovery prior to coming to the clinic. Under such circumstances, the clinic generally has a policy of requiring fourteen days of residential treatment. Mr. Steele characterized his dealings with Ms. Lopez-Hickson and the Agency as "lengthy, time consuming, and at times frustrating,"[1] involving extra reports, delays in being able to reach Ms. Lopez-Hickson, and difficulty in determining a discharge date and where the Grievant would go after he was discharged. He was not successful in obtaining permission for the Grievant to finish his residential treatment earlier than called for in the plan; therefore, despite the fact that the treatment provider felt that the Grievant was fully ready to leave residential treatment at an earlier date, the Grievant remained in residential treatment for the entire twenty-eight days.

The Grievant testified that: Calls were made to Ms. Lopez-Hickson, who explained that it was not up to her to decide whether the Grievant could finish residential treatment early, and that she needed to confer with Deputy Regional Flight Surgeon Stephen Griswold, M.D. When he and Mr. Steele did not hear anything further from Ms. Lopez-Hickson, they called Dr. Griswold; however, he was not in his office. They then called Gary Pippenger at Magellan Behavioral Health. Mr. Pippenger told them that Ms. Lopez-Hickson was more familiar with his case; therefore, it was up to her to make a decision. At that point, the Grievant was feeling very frustrated and was close to completing the twenty-eight days of residential treatment, so he told Mr. Steele that he would just go ahead and complete the course of treatment set forth in the rehabilitation plan.

Cindy Lopez-Hickson testified that she recalled speaking to Mr. Steele several times on the phone; however, she did not recall that they ever discussed whether the Grievant should be permitted to finish his residential treatment earlier than called for in the rehabilitation plan of the Agency. Dr. Griswold testified that he was not aware that the clinic was seeking permission for the Grievant to finish his residential treatment early. He did not recall Ms. Lopez-Hickson ever saying anything to him about it.

Robert Steele testified that during the residential program, the Grievant was anxious to find out from the Agency what he needed to do to fulfill the requirements of

[1]. Transcript, Vol. I, p. 170.

its rehabilitation plan. He stated that he and the Grievant had very frank conversations about the desire of the Grievant to satisfy the requirements of the Agency and to find out exactly what it wanted of him, so that he could comply. Mr. Steele added that he had never before dealt with an employer that placed requirements on the clinic that were outside of its normal program.

As provided for the in Agency rehabilitation plan, the Grievant next entered a minimum two week period of day treatment. Robert Steele testified that: The clinic normally did not provide the type of outpatient treatment called for in the Agency's plan; therefore, it had to improvise a course of treatment to meet the requirements of the Agency. He called Ms. Lopez-Hickson during the last week of residential treatment to find out where the Grievant should go next. She told him that she was not sure and would have to confer with her superiors at the agency; as a result, it took her three or four days to get back to Mr. Steele. Ultimately, the clinic was informed by the Agency that the Grievant should undergo two or three weeks of five-day-a-week, all-day, outpatient treatment at the clinic. The clinic normally moves clients from residential treatment to three evenings per week of intensive outpatient treatment while they are allowed to resume employment; it has no all-day outpatient treatment program. In the case of the Grievant, the clinic improvised a program which called for him to live at home but to participate in therapy five days a week, without returning to work.

Ms. Lopez-Hickson testified that she was aware that the clinic had modified its normal treatment program in order to accommodate the Agency. She stated that such was not unusual.

The Grievant testified that: He entered day treatment on May 28, 2001. During said phase of his rehabilitation, he resumed taking prescription medications for his back problem. During a routine urinalysis, he tested positive for opiates in his system, due to the medication that he was taking. He had not realized that the clinic had a policy of not allowing clients to take pain medication of that type even after residential treatment had been completed; therefore, the possibility arose that he would be discharged from the program. The staff at the clinic conferred and decided that if the Agency did not object to the Grievant taking his prescription medications, then such would be permitted by the clinic. He and Mr. Steele called Ms. Lopez-Hickson to inform her and seek guidance. Mr. Steele subsequently informed the Grievant that he had gotten permission from the Agency for the Grievant to take his medications, and that he would be permitted to stay in the program.

Robert Steele testified that although the clinic was not happy that the Grievant had resumed taking opiates for his back problem, Mr. Steele had contacted the Agency and had been told that the medications had been listed and registered, and that the Agency considered it permissible for the Grievant to take them. Based upon said information, the staff at the clinic decided to allow the Grievant to remain in rehabilitation and to continue taking the medications. Dr. Griswold testified that the

Agency never was asked if the Grievant should be permitted to take prescription drugs once he had finished the residential portion of his rehabilitation plan, nor did it ever approve such a request.

The Grievant testified that after two weeks in day care, he called Ms. Lopez-Hickson to ask what he should do next. He never received a direct reply, but Mr. Steele subsequently informed him that Ms. Lopez-Hickson wanted the Grievant to stay in day treatment for one additional week. The Grievant never was told why.

The Grievant successfully completed the day treatment portion of the plan and moved on to the next phase, which consisted of intensive outpatient treatment for three or four hours a day for a minimum of four weeks. Based upon events that took place during said phase of the rehabilitation plan, the Agency concluded that the Grievant had violated the plan and discharged him from his employment. The discharge took effect January 25, 2002, and gave rise to the instant grievance.

Chemical Dependency Outpatient Therapist Beth Kufner testified that: On June 18, 2001, the Grievant signed the clinic's Outpatient Program Agreement (Agency's Exhibit 1) which, in pertinent part, provides for nine weeks of intensive outpatient treatment, followed by nine weeks of a relapse prevention program. The Agreement further provides that the Grievant was permitted to have three excused absences and one unexcused absence. The Grievant also attended orientation for the outpatient program, which was conducted by another therapist.

The actual rehabilitation itself was uneventful. The Grievant attended and participated as required. Although he had three absences prior to August 15, 2001, Ms. Kufner testified that all of those absences were excused, and Ms. Lopez-Hickson concurred. After he had been in intensive outpatient treatment for the minimum four weeks required by the Agency, the Grievant began contacting Ms. Lopez-Hickson to learn when he could move on to the next phase, which would consist of attending daily twelve-step meetings for ninety days.

Ms. Lopez-Hickson testified that: After the Grievant started intensive outpatient treatment, she communicated with him by voice mail. Her answering machine remains turned on on weekends, and she checks it on a daily basis. Because she travels on occasion, callers are informed that they are to call a Duty Officer if their matter is urgent.

Ms. Lopez-Hickson further testified that: The Grievant called her on a weekly basis to make sure that he was doing what he needed to do. Eventually, he also had questions about progressing to the next phase of treatment. She was waiting for progress reports from the clinic, and needed to confer with Dr. Griswold; therefore, she told the Grievant to continue receiving outpatient treatment and that he was doing well.

Ms. Kufner testified that: During the months of June and July, she spoke several times to Cindy Lopez-Hickson regarding the progress of the Grievant, and subsequently provided her with Progress Reports. A Progress Report for the fifth week

of outpatient treatment, dated July 19, 2001 (Joint Exhibit 4, Attachment C-II, p. 3) reflects that the Grievant was making progress in treatment and had assumed a leadership role, but seemed to want to leave treatment because he had fulfilled the requirements of the Agency. Similar comments appear in the report for week six, which is dated July 26, 2001 (Joint Exhibit 4, Attachment C-II, p. 4); week seven, which is dated August 2, 2001 (Joint Exhibit 4, Attachment E-II, p. 1); and week eight, which is dated August 9, 2001 (Joint Exhibit 4, Attachment E-II, p. 2).

Ms. Lopez-Hickson testified that the Progress Reports were not provided to her until August 17, 2001. A letter from Ms. Lopez-Hickson dated August 29, 2001 (Joint Exhibit 4, Attachment J-II), recites that she most recently had spoken to Ms. Kufner on July 12, 2001; however, Ms. Lopez-Hickson testified that the letter was in error, and that she subsequently had spoken to Ms. Kufner on August 3, 2001, and August 17, 2001. She added that it was possible that she was not in frequent contact with Ms. Kufner while the Grievant was in the intensive outpatient treatment phase of the program. She stated that she also did not receive any progress reports from the clinic during that time.

The Grievant testified that: He kept a log of his telephone conversations regarding his progress in rehabilitation. The log (Union Exhibit "A") reflects that on July 10, 2001, he asked Ms. Lopez-Hickson what he should do when the minimum four weeks of treatment were completed the following week, and was told to continue doing what he was doing, and that she could not give him a more specific answer because she needed to confer with some doctors. The entry for the week of July 17, 2001, reflects that the Grievant told Ms. Lopez-Hickson that he was concerned that he had no paperwork setting forth what was required of him, and that he had asked her what was expected; however, he go no reply. The entry for the week of July 24th reflects that the Grievant was in the sixth week of the outpatient treatment phase of the plan, and still was concerned because he did not have any paperwork. Ms. Lopez-Hickson told him that he was doing well and should continue doing what he had been doing. The note for the week of July 31st states that the Grievant felt scared and that the directions that he was receiving were vague. The notes for the week of August 7th state, "Really getting to me not knowing what to do from one week to the next. Cindy says keep doing what I am doing, everything is fine, waiting for paperwork from Beth." The final entry for that week states, "Given O.K. to transition to next phase."

The Grievant testified that: He received said permission to move on to the next phase of rehabilitation in a call from Ms. Lopez-Hickson on August 9, 2001. She told him that after speaking to Dr. Griswold and reviewing some paperwork, she had decided that it was all right for him to move on to the next phase of treatment. The Grievant had replied that that was great, that he could not wait to get back to work, and the sooner the better. He had a rehabilitation session that night, at which time he informed Ms. Kufner that he had been given permission to make the transition to the

next phase of treatment, and that he thus would not be returning to intensive outpatient treatment. Ms. Kufner told him that she was concerned how others in the outpatient treatment program might feel when they learned that the Grievant was leaving the program early; therefore, he volunteered to come back the following week, on August 14th, to say goodbye to everyone and to explain exactly what he was doing and why he was doing it. When he did return on August 14th, Ms. Kufner told him during a break that if he did not attend graduation, which was to take place on August 16th, there was a good chance that he would be considered non-compliant by the clinic. He had replied that his concern was that he comply with the requirements of the Agency plan.

The Grievant further testified that: On August 13, 2001, he called Ms. Lopez-Hickson and left a message that on August 15th he would be starting the next phase of treatment, which was to attend ninety meetings in ninety days, although he was mistaken about the date on which he would be starting the meetings, and actually started on August 13th. He also asked her for forms to document his attendance. Ms. Lopez-Hickson subsequently faxed him the forms, along with a written message dated September 13th (Joint Exhibit 4, Attachment G-II) thanking him for the update. He next heard from Ms. Lopez-Hickson the following week, when she left a message asking him why he had not finished the clinic program. He replied that she had given him permission to move on to the next phase after week eight of the clinic's eighteen-week program, which he had never been slated to complete. On August 30, 2001, Ms. Lopez-Hickson had informed him that he was to be discharged for failing to comply with the requirements of the rehabilitation program; specifically, by missing the final two session of intensive outpatient treatment, which had taken place on August 15th and 16th. He could have attended the final two sessions if such had been necessary; he never specifically asked Ms. Lopez-Hickson if he needed to go. It is uncontroverted that despite being found non-compliant by the Agency and the clinic, and subsequently being discharged from his position, the Grievant completed the next phase of treatment by attending the ninety self-help meetings. *See,* Joint Exhibit 24.

Ms. Lopez-Hickson agreed that she gave the Grievant permission to move on to the next phase of treatment, but stated that said conversation took place on September 13, 2001, as opposed to September 9th. She testified that: When she had left the message that the Grievant could move on to the next phase of treatment, she had meant that he should finish that week of outpatient therapy and then start attending twelve-step meetings the following week. The Grievant never informed her that he would be absent from outpatient treatment on August 15th and 16th. On August 17, 2001, Beth Kufner called to inform her that the Grievant had missed those two sessions, and that he had been counseled on August 14th. Ms. Kufner told her that the Grievant had made the decision to stop attending outpatient treatment because he had met the requirements of the Agency's rehabilitation plan. Ms. Kufner also had told her that the staff at the clinic had discussed the situation on August 16th, and had come to the conclusion that if the

Grievant felt that it was not important for him to be there to graduate, the clinic would not graduate him. Ms. Lopez-Hickson added that if she had been aware that the Grievant did not intend to complete the ninth week of outpatient therapy, she would have told him that he needed to do so.

Beth Kufner testified that: On July 18, 2001, she and the Grievant first discussed the possibility that he would finish outpatient treatment early. On August 14, 2001, during a break, she told him that if he left the group he would be considered to be non-compliant with the clinic program, and that he specifically needed to attend on August 15th and 16th. A Progress Report for the week of August 15th (Joint Exhibit 4, Attachment E, p. 3) states that the Grievant left on August 14, 2001, stating that he had fulfilled his employer's requirements. The report further states that the Grievant was notified that if he did not attend graduation on August 16, 2001, he would be considered to not be in compliance with the rehabilitation program, and that he accepted such. During the group session on August 14th, the Grievant had stated that he understood that by finishing his outpatient treatment that night, he would not be in compliance with the clinic program; however, that was all right because he had met the requirements of the Agency plan.

Ms. Kufner testified that when the Grievant failed to return for outpatient treatment the following day, she spoke to her supervisor. Together they decided that the Grievant had not complied with the requirements of the rehabilitation program. Ms. Lopez-Hickson subsequently had been notified accordingly. Ms. Kufner conceded that because the requirements of the clinic rehabilitation program and the requirements of the Agency rehabilitation plan were different, the Grievant could be in compliance with one but not the other. She added that when she spoke to Ms. Lopez-Hickson on August 17th, Ms. Lopez-Hickson did not inform her that she had given the Grievant permission to make the transition to the next phase of treatment.

Ms. Lopez-Hickson testified that: She was not aware that Ms. Kufner learned on August 14th that the Grievant did not intend to graduate; Ms. Kufner never called her with that information. On Friday, August 17th, she left a message on the Grievant's answering machine that his failure to attend outpatient therapy, failure to graduate, and lack of success in treatment, were considered serious. The Grievant called back either that day or the following Monday and left a message that he had been very patient and had waited for the doctors to call back, and that he would do anything that the program required. At some point, she and the Grievant actually had a conversation over the phone, at which time he informed her that he was completing the phase of rehabilitation that required him to attend ninety meetings in ninety days, and also was attending weekly aftercare sessions, as called for in the Agency plan.

By Non-Compliance Progress Report dated August 29, 2001 (Joint Exhibit 5, Attachment S), Ms. Lopez-Hickson informed the Grievant that: She had been informed by the clinic that following three absences in July of 2001, he had had two additional

absences. Of the five absences, only one, on July 12, 2001, had been excused by Ms. Lopez-Hickson. In addition, the Grievant had failed to complete the intensive outpatient treatment program, and had been counseled by Ms. Kufner that failing to attend the graduation from that phase of the rehabilitation program would result in his being considered not in compliance with the program requirements of the clinic. Although the Grievant subsequently had told Ms Lopez-Hickson that he had misunderstood the requirement that he must continue attending outpatient therapy on August 15th and 16th, and that if he had known that such was required by the Agency, he would have attended on those days, any questions regarding successful completion of the program should have been referred to her for clarification. Based upon the foregoing, the Grievant was considered to have not successfully completed the Agency rehabilitation plan.

By letter from John Carlson dated September 20, 2001 (Joint Exhibit 5, Attachment R), the Grievant was informed that the discharge that had been proposed on January 22, 2001, and held in abeyance on July 26, 2001, was going to be implemented because the Grievant had exceeded the number of allowable absences permitted during intensive outpatient treatment and had not completed that phase of the program. The Grievant therefore was to be removed from his position effective October 4, 2001. The Grievant thereafter filed the instant grievance, and the removal was held in abeyance. As set forth above, after considering additional information, Mr. Carlson ultimately removed the Grievant from his position effective January 25, 2002. The Agency contends that the terms of its rehabilitation plan were very clear, and that the Grievant failed to comply therewith. The Agency asserts that in those instances where the requirements of the clinic were more stringent than those of the Agency, the Grievant was required to adhere to the requirements of the treatment provider. The Agency also asserts that if the Grievant had any question about what was required of him, he knew that he should call Ms. Lopez-Hickson for clarification. The Agency contends that the Appellant chose to selectively misunderstand the situation, that removal from his position was the appropriate response, and that said imposition of discipline should not be disturbed.

The Union argues that there was an honest misunderstanding on the part of the Grievant regarding what was required of him, which may have been caused, in part, by the failure of the clinic to keep the Agency apprised of his progress. The Agency emphasizes that Arbitrators long have held that a reasonable misunderstanding will not support a finding that there was just cause for a discharge. The Union also asserts that the Agency did not conduct an adequate investigation into the circumstances that gave rise to the removal, and thus deprived the Grievant of procedural and substantive due process, in violation of Article 6, Section 4 of the Collective Bargaining Agreement, *supra.* Under such circumstances, the removal of the Grievant also did not promote the efficiency of the service, and should not be allowed to stand.

Mr. Carlson testified that: After informing the Grievant that he proposed to remove him from his position effective October 4, 2001, he held the removal in abeyance in order to give himself, the Region, and Agency headquarters a chance to look at the case and to consider all of the data. Many people were looking for a way to bring the Grievant, who was considered a good employee, back to work. The Grievant was discharged for failing to attend intensive outpatient treatment sessions on August 15th and 16th. Although the Grievant informed Mr. Carlson that he and Ms. Lopez-Hickson had had some sort of a difference of opinion, Mr. Carlson had not been aware that they had spoken on or about August 9, 2001, regarding the Grievant making the transition to the next phase of treatment. Mr. Carlson had told the Grievant that the Grievant would have to work out the difference of opinion with Ms. Lopez-Hickson, because Mr. Carlson did not involve himself in matters between an employee and the Employee Assistance Program Manager; such matters are private and confidential. He thereafter had no further conversations with the Grievant, although there were probably four or five different occasions when the Grievant and the Union were given the opportunity to come forward with information that would contradict the information that Mr. Carlson had gotten from Ms. Lopez-Hickson. Mr. Carlson stated that no additional information was provided; therefore, he had relied on the information that he got from Ms. Lopez-Hickson and from the office of the Deputy Flight Surgeon.

Mr. Carlson conceded that there could have been a misunderstanding or miscommunication between the Grievant and Ms. Lopez-Hickson; however, he did not take such into account in making the decision to discharge the Grievant because he does not get in the middle of conversations between the Employee Assistant Program Manager and the employees that she deals with. He also never specifically asked Ms. Lopez-Hickson if the Grievant had been given permission to progress to the next phase of treatment. He was told by the supervisor of the Grievant that the Grievant had immediately started the next phase of treatment, and believed that such were the actions of an employee who believed he had been given permission to progress to that phase of treatment and who intended to fulfill the requirements of the Agency's rehabilitation plan. He did not investigate whether there had been any confusion regarding the requirements of the rehabilitation plan, because Mr. Carlson considered said requirements to be very clear. He did not ask to see the files of Ms. Lopez-Hickson, speak to any of the rehabilitation counselors of the Grievant, or review progress reports that had been submitted. He never asked the Grievant why he had participated in therapy for seventeen weeks, used 300 hours of leave to do so, spent approximately $10,000 of his own money to pay for treatment, and then failed to complete the last two days of intensive outpatient treatment. Relying on information received from Ms. Lopez-Hickson, the Deputy Flight Surgeon, and the clinic, Mr. Carlson had concluded that the Grievant had violated the provisions of the rehabilitation plan and that he therefore should be removed from his position. Dr. Griswold testified

that: He was notified by Ms. Lopez-Hickson that the Grievant had failed to comply with the requirements of the rehabilitation program. He subsequently met with her, Labor Relations Specialists, and Employee Involvement Coordinator Malachy Coughlin on or about August 28, 2001, to discuss the situation. During the meeting, Ms. Lopez-Hickson had stated that she had had a conversation with the Grievant regarding his failure to comply with the treatment plan, but had not disclosed the substance of their discussion. He considered Progress Reports that had been issued by the provider during the outpatient phase of therapy to constitute red flags; specifically, the reports showed an absence on July 12, 2001, and that after the Grievant completed the minimum four weeks of outpatient treatment, he seemed anxious to move on to the next phase. Dr. Griswold conceded that none of these reports was provided to the Agency until after it had been determined by the clinic that the Grievant was not in compliance with the rehabilitation plan, and thus that no red flags had come to the attention of the Agency while the Grievance was in treatment. He added that by failing to attend outpatient treatment on August 15th and 16th, the Grievant also had failed to comply with the portion of the Agency's rehabilitation plan that required him to agree to any additional treatment or counseling as recommended by the treatment provider.

Dr. Griswold further testified that: The drug testing Order does not permit a second course of rehabilitation therapy; therefore, he issued a Memorandum of Non-Compliance with Treatment dated August 30, 2001 (Joint Exhibit 4, Attachment K-II). He added that during treatment, the Grievant could have contacted him or the Employee Assistance Program Manager at any time, but had not availed himself of that opportunity.

Ms. Lopez-Hickson testified that she could not recall if she told Mr. Carlson that she had given the Grievant permission to progress to the next phase of therapy. She stated that he never asked her why the Grievant had missed the last two days of outpatient treatment. She denied that the Grievant ever refused additional treatment recommendations that had been made by his treatment provider, as asserted by Dr. Griswold.

The Grievant testified that he spoke to Ms. Lopez-Hickson on August 30, 2001, at which time she told him that by making the transition to the next phase of therapy, he had done what she had told him to do, but not what she had meant. He stated that he would have attended the ninth week of outpatient therapy if he had known it was required by the Agency. Although he clearly understood that he would not be in compliance with the clinic program if he failed to attend, he took his directions from the Agency, as opposed to the West Yavapai Guidance Clinic.

I find that the situation at issue best can be summed up by Strother Martin's statement to Paul Newman in the movie *Cool Hand Luke*[2]: "What we've got here is

[2]. Screenplay by Donn Pearce and Frank Pierson; based on the novel by Donn

failure to communicate." In the first instance, I find that the Agency fashioned a rehabilitation program for the Grievant that was to be implemented by an outside entity; namely, the West Yavapai Guidance Clinic. I find that during the course of treatment, there were at least two instances prior to the event that led to the discharge of the Grievant, in which the requirements of the Agency plan and the practices of the clinic were in conflict. In both instances, the requirements of the Agency took precedence. To be specific, when the Agency plan provided for twenty-eight days of residential treatment, and the clinic staff felt that the Grievant required only two weeks of residential treatment, the Grievant completed the twenty-eight days of treatment required by the Agency. And when the clinic learned that the Grievant had resumed taking prescription medications during the day treatment phase of his rehabilitation program, which was not permitted by its rules and normally would have resulted in his being expelled from the rehabilitation program, the Grievant was permitted to remain in therapy, and no violation was deemed to have occurred, because the use of such medications was permitted by the Agency. In addition to the foregoing, I find that the Agency plan and the clinic program were different in other significant aspects: (1) after residential treatment was completed, the Agency plan called for a day treatment program, while the clinic had no such requirement; (2) the Agency plan called for a minimum of four weeks of intensive outpatient treatment, while the clinic program required nine weeks of intensive outpatient treatment; and (3) under the Agency plan, intensive outpatient treatment was to be followed by three months of daily twelve-step meetings, while the clinic program called for nine weeks of a relapse prevention program. I therefore find that it was reasonable for the Grievant to believe that when a conflict arose between the requirements and/or rules of the Agency and those of the clinic, he was expected to adhere to the standards of the Agency.

Turning to the Grievant's decision to make August 14, 2001, the last day of the intensive outpatient treatment phase of his rehabilitation program, and the resulting determination by the Agency that the Grievant had not complied with the requirements of its plan and thus should be removed from his position, I am mindful that persons undergoing rehabilitation therapy for substance abuse can be manipulative and untruthful. I therefore carefully examined the circumstances surrounding the assertion of the Grievant that he stopped attending intensive outpatient therapy two days short of graduation because he believed that he had been given permission to do so by the Agency's Employee Assistance Program Manager. I find it to be significant that progress reports that were written by clinic staff as far back as July 19, 2001, during the fifth week of outpatient treatment and approximately one month before such action was taken by the Grievant, reflect that the Grievant consistently expressed a desire to

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Pearce.

comply with the requirements of the Agency. I find that such documentation is consistent with the log produced by the Grievant, in which he expressed on July 31, 2001, that he was feeling anxious about not receiving more specific directions from the Agency regarding how long he should continue to receive intensive outpatient treatment. In addition, I find that the testimony of Beth Kufner confirms the assertion of the Grievant that on August 14, 2001, before any breach of the agreement had occurred, the Grievant stated that he was leaving outpatient therapy two days shy of graduation because he had been given permission to do so by the Agency, and thus would be in compliance with its rehabilitation plan when he did so. I therefore find that said justification was not something that occurred after the fact; it is consistent with the avowed intentions of the Grievant as they were documented both by the clinic and by him for over a month before he finished his outpatient therapy. In addition, Ms. Lopez-Hickson testified that she believed that Grievant was not lying when he stated that he had misunderstood her directions to him about finishing outpatient treatment.

Although the Agency contends that the clinic was free to expand the treatment plan, and that the Grievant agreed to comply with any such modifications when he signed the Agency's rehabilitation plan, I find that the numerous differences between the requirements of the Agency and the requirements of the clinic created a situation in which it would be unreasonable to expect the Grievant to automatically infer that graduation from the nine-week intensive outpatient treatment phase of the program, as required by the clinic, was the one clinic requirement that also was expected of him by the Agency. I find that the testimony of Ms. Lopez-Hickson supports the contention of the Grievant that she never specifically told him that he was expected to stay in the outpatient program through August 16th. I therefore find that a reasonable person would not have been on notice that Agency expected him to do so.

In addition to the foregoing, I find that communications between the Agency and the Grievant, and between the Agency and the clinic, were less than ideal. I find that although Beth Kufner was on notice on August 14, 2001, that the Grievant did not intend to attend any more outpatient therapy sessions, she did not inform the Agency of such until August 17, 2001, when it was too late for Ms. Lopez-Hickson to clarify to the Grievant that such was expected of him. I also find that the clinic failed to supply progress reports to the Agency for the months of July and August of 2001 until August 17, 2001, when Ms. Kufner informed Ms. Lopez-Hickson that the Grievant had not complied with the treatment plan. The Agency thus was deprived of an important tool for monitoring the progress of the Grievant, which possibly could have contributed to avoiding the misunderstanding that occurred. Finally, I find that because Ms. Lopez-Hickson and the Appellant communicated solely via voice mail when he was undergoing outpatient therapy, the opportunity for miscommunication was enhanced. I find that the Agency considered it critical that the Grievant adhere precisely to the rehabilitation plan; therefore, it had a duty to clearly communicate the requirements of

said plan to him. This entire misunderstanding could have been avoided if Ms. Lopez-Hickson simply had notified the Grievant in writing that he could make the transition to the next phase of treatment after attending outpatient therapy for the last time on August 16th. I find that a written direction would have drastically reduced the opportunity for ambiguity, and would have created a reliable record of what the Grievant had been instructed to do. Because such method of communication was not employed, the occasion for a misunderstanding arose, and subsequently resulted in the events before me herein.

I further find that in making the decision to remove the Grievant from his position for failing to comply with his rehabilitation plan, Mr. Carlson relied on the representations of Ms. Lopez-Hickson that the Grievant had not been successful in rehabilitation. I find that in so doing, the Agency failed to adequately consider whether the actions of the Grievant were inadvertent; the lack of clarity regarding the notice given to him that any were rules were being violated; and the mitigating circumstances surrounding the offense. I therefore find that the factors set forth at Article 6, Section 4 of the Collective Bargaining Agreement, *supra*, were not given adequate consideration before determining that disciplinary action was warranted.

For the reasons set forth above, I conclude that the removal of the Grievant from his position was not for just cause and did not promote the efficiency of the service, and thus violated Article 6, Section 3 of the Agreement.

AWARD

The Grievance is sustained.

REMEDY

At the arbitration, the parties agreed that if the grievance was sustained, the Arbitrator should maintain jurisdiction of this matter in order to address the issue of remedy at a later time. In consideration thereof, I am hereby retaining jurisdiction of this matter until a remedy either has been agreed upon by the parties or, if that does not occur, ruled upon by me. I also am retaining jurisdiction of this matter to deal with any issues that may arise involving implementation of the remedy, and, should the parties be unable to agree on the issue of paying attorney's fees and costs to the prevailing party, to rule on a petition for attorney's fees and costs pursuant to the Back Pay Act, 5 U.S.C. 5596, which it is the intention of the Union to file.

I hereby direct the parties to confer as soon as possible regarding the remedy to be provided. If the parties cannot agree upon a remedy within thirty days of receipt of this decision, they are to contact the Arbitrator to make arrangements to reconvene these proceedings in order to consider said issue. I find that, at a minimum, the

Grievant should be returned to his position, subject to such conditions, if any, customarily imposed upon an employee who has successfully completed a rehabilitation program for substance abuse, and should receive back pay and all other benefits to which he would have been entitled had he not been discharged; in addition, all references to the charge that led to these proceedings should be expunged from the records of the Agency, including the official personnel file of the Grievant.

Respectfully submitted,

JILL KLEIN
Arbitrator

October 3, 2002
Pasadena, California